In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1682

JOHN ELWOOD DENNETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact, conclusions of law and judgment of the district court, set forth in Appendix A, *infra*, pp. 9-17, are not reported. The order of the Tenth Circuit Court of Appeals dismissing the petitioner's appeal, set forth in Appendix A, *infra*, pp. 18-19, is not reported.

JURISDICTION

The order of the court of appeals was entered on January 26, 1972. A motion for extension of time

to file a petition for rehearing was denied on February 15, 1972. Mr. Justice White granted successive extensions of time for filing the petition for a writ of certiorari to May 25, 1972, and to June 24, 1972. The petition for a writ of certiorari was filed on June 24, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

QUESTION PRESENTED

Whether the court of appeals abused its discretion in dismissing petitioner's appeal for failure to file his opening brief within the time provided after liberal extensions.

RULES INVOLVED

The pertinent provisions of Rules 12, 25, 28 and 31 of the Federal Rules of Appellate Procedure are set forth in Appendix B, *infra*, pp. 20-21.

STATEMENT

The underlying controversy in this case arose from an assessment for federal income taxes against petitioner in the amount of $112,235.67 (including penalties and interest). After the assessment was made, Continental Bank & Trust Company held a fund to which there appeared to be several competing claimants, including the petitioner and the United States, by virtue of its tax assessment against the petitioner.

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[1] Petitioner invokes this Court's jurisdiction also under 28 U.S.C. 1651(a) and 2241, but it is apparent that jurisdiction properly lies only under Section 1254(1).

Accordingly, Continental Bank & Trust Company brought an interpleader action, depositing the fund into court and joining as defendants in interpleader the petitioner and the United States, among other parties.

In its answer and cross-claim, the United States asserted that federal income taxes for the year 1961 had been assessed against the petitioner in the amount of $112,235.67 and requested that the district court adjudge petitioner's liability for the taxes and grant the United States priority to the interpleaded fund.

Trial of the interpleader action was held during September 1970 in the United States District Court for the District of Utah. Following the advice of a specially impanelled advisory jury, the district court held that petitioner owed federal income taxes for 1961 in the amount of $117,043.76 (including penalties and interest) and that the United States had priority to the interpleaded fund. The court rendered judgment accordingly.

Petitioner then filed a timely notice of appeal to the Tenth Circuit Court of Appeals.

The appeal was docketed on August 26, 1971, and petitioner was notified on that date that he should be prepared to file his opening brief by September 16, 1971. On September 8, 1971, the Tenth Circuit Court of Appeals by letter from its Deputy Clerk advised petitioner that the appeal had been assigned to the summary calendar, making the brief due on September 16, 1971, and further advised:

briefs *must* comply with the Federal Rules of Appellate Procedure, and will not be accepted for filing unless and until they do so comply. See Rule 28 in particular.

On September 17, 1971, petitioner filed a purported stipulation between himself and the United States for an extension of time for ninety days within which to file the briefs in the case.[2] The extension granted was to and including November 16, 1971. On November 15, 1971, petitioner filed a motion requesting the following relief: (1) an extension of time for filing his opening brief; (2) provision of a trial transcript, which had not yet been prepared, because he could not afford to pay for one; and (3) appointment of a special master to redetermine his tax liability.

The United States responded to this motion by letter stating in pertinent part: (1) the government had no objection to any reasonable extension of time; (2) if the request for a trial transcript could be read as a request that the government incur the cost therefor, the government did oppose that request, particularly since petitioner had not filed a request for leave to proceed *in forma pauperis*; and (3) the government opposed the appointment of a special master to redetermine petitioner's tax liability, for any error in the district court's determination could be pre-

[2] Rather than stipulating to the said extension, however, the United States through a local Assistant United States Attorney merely stated that it had no objection to the granting of the extension by the court.

sented in the appellate brief and argument in the usual manner.

On November 29, 1971, the court of appeals granted only petitioner's motion for an extension of time and limited that extension to December 20, 1971, with the further notation that no further extensions would be granted to petitioner.

On December 21, 1971, petitioner personally delivered a document entitled "Opening Brief" to the office of the Clerk of Court for the Tenth Circuit Court of Appeals. The Clerk's docket entry indicates that the brief was received but not filed. On December 30, 1971, the Deputy Clerk of Court notified petitioner by letter that petitioner had not filed a motion to have his brief filed out of time and that the brief received by the court did not have an index, cover page or certificate of service. The Deputy Clerk advised that, under the local rules of the court, the appeal would be dismissed unless petitioner remedied the stated defects within fifteen days of the date of the letter.

On January 17, 1972, petitioner tendered new "opening briefs" amended to include cover page, index and certificate of service, and filed a motion for leave to file his opening brief on December 21, 1971. On January 26, 1972, Judges Hill and McWilliams of the Tenth Circuit Court of Appeals denied petitioner's motion for leave to file on December 21, 1971, and dismissed petitioner's appeal for failure to timely prosecute because petitioner had failed to file the brief on time.

On February 10, 1972, petitioner filed a motion for extension of time to file a petition for rehearing. This motion was denied by Judges Hill and McWilliams on February 15, 1972.

ARGUMENT

The order of dismissal was within the discretion of the court of appeals. There is no conflict or other reason for review.

This Court recognized in *Link* v. *Wabash Railroad Co.*, 370 U.S. 626, 629-633, that a court has inherent power to dismiss *sua sponte* a case for failure to prosecute and that the only review therefrom will be for an abuse of discretion. Although *Link* involved dismissal by a trial court, similar considerations are appropriate on appeal. The orderly and efficient administration of appeals requires that the courts of appeals have this power.

The court of appeals here did not abuse its discretion in dismissing the appeal. Petitioner had been given liberal extensions, totalling 95 days, in addition to the twenty-one days provided with respect to appeals assigned to the summary calendar, within which to file his opening brief, and he had been explicitly warned upon being granted the final extension that no further extensions would be granted.

Petitioner's assertion (Pet. 22) that he qualified for the "timely mailing, timely filing" provision of Rule 25, Fed. R. App. P., is without merit. The "timely mailing, timely filing" provision is simply

not applicable when the briefs are posted but intercepted at the sender's behest and returned to him prior to delivery to the court.[3]

Furthermore, petitioner has never satisfied his obligation to present to the court of appeals a record, including the trial transcript, from which the errors of which he complains may be demonstrated. This failure would alone justify dismissal of his appeal. See Rule 12(c), Fed. R. App. P. Petitioner does not suggest here that he is now willing to comply with this requirement, and should the case be remanded

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[3] Petitioner's alleged reason for taking this unusual and, in light of Rule 25, unnecessary action is (Pet. 22) that he purchased metered postage for the briefs at the Salt Lake City Airport postal facility on December 20, 1971, the last date of the final extension, but that he retrieved the briefs from the postal facility in order to permit him to hand-deliver the briefs to the court in Denver. The alleged reason for the retrieval was that fog had prevented ingress and egress from the Salt Lake City Airport on December 20, 1971, and, fearing that the Clerk of Court would dismiss the appeal on December 21, before the mail could arrive, he decided to deliver the briefs personally "as soon as the fog lifted." In his motion for leave to file his "opening brief" on December 21, 1972, petitioner made no mention of having posted the briefs but stated that the airport "was closed due to fog conditions and no airplanes departed the airport for Denver on the afternoon or evening of December 20, 1971."

We are informed by the United States Postal Service that the Salt Lake City Airport has no postage metering device. Moreover, we have been informed by Western Air Lines and United Air Lines, both of which have service between Salt Lake City and Denver, that, although the airport was experiencing inclement weather conditions on that date, flights were departing Salt Lake City for Denver on December 20, 1971.

to the Tenth Circuit, the government will be compelled to file a motion to dismiss under Rule 12(c).[4]

For these reasons, we respectfully submit that the court of appeals did not abuse its discretion in dismissing taxpayer's appeal for failure to file his brief in time and in the appropriate form.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

MEYER ROTHWACKS,
JOHN A. TOWNSEND,
Attorneys.

AUGUST 1972.

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[4] Petitioner alleges (Pet. 20) that he was unable to prepare an opening brief because the government had seized his trial records and would not return them. We deny this allegation. In an attempt to locate assets of petitioner, Internal Revenue Service officials had seized and padlocked petitioner's offices. Sometime within three days after this seizure, someone broke into the offices and removed certain of petitioner's files. Investigations are presently being made into this forcible entry and burglary.

We note in this regard, however, that the original trial record (excepting the trial transcript, which has never been prepared) remains in the trial court at the stipulation of the parties. Petitioner's assertion to the contrary (Pet. 21) is inaccurate. Thus, petitioner could have prepared his brief by reference to the original record but still would have been confronted with the absence of a trial transcript.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Civil No. C 203-68

CONTINENTAL BANK & TRUST COMPANY, PLAINTIFF

vs.

JOHN ELWOOD DENNETT, ET AL., DEFENDANTS

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This cause came on before the Court for trial on September 21, 1970 in Salt Lake City, Utah, and a jury was duly impanelled to hear and determine the facts of this matter in an advisory capacity in accordance with Rule 39(c) of the Federal Rules of Civil Procedure. The defendant United States of America was represented by John R. Gauntt, Tax Division, Department of Justice, and H. Ralph Klemm, Assistant United States Attorney for the District of Utah; defendant John Elwood Dennett acted as his own attorney; defendant Clyde Dwayne Harrison was represented by Walter R. Ellett, Attorney at Law; and defendant Herschel J. Saperstein, Trustee in Bankruptcy, was represented by Bill Thomas Peters, Attorney at Law. The Court has heretofore granted summary judgment in favor of the plaintiff Continental Bank & Trust Company, releasing and discharging said plaintiff from further liability with respect to the monies paid into the registry of this Court, and the defendant Beneficial

Life Insurance Company was heretofore dismissed from this action by the Court.

At the conclusion of the presentation of the evidence by the parties, and after all parties had rested their cases, the Court, upon motion of the defendant United States of America, dismissed the claims of defendant Herschel J. Saperstein, Trustee in Bankruptcy, on the ground that there was no evidence to show that the funds on deposit with the Clerk of the Court came from property owned by the defendant John Elwood Dennett on or before September 14, 1967, the date upon which he filed his petition in bankruptcy. The motion of defendant United States of America for default judgment and defendant John Elwood Dennett's motion to strike the cross-complaint of the United States are hereby denied.

The Court submitted special interrogatories to the jury pursuant to Rule 49(a) of the Federal Rules of Civil Procedure, and after due deliberation, the jury returned to the Court and reported that they had unanimously answered the following interrogatories as shown herein:

1. Do you find by a preponderance of the evidence that when the "Waiver", U.S.A. Exhibit 11, was signed by John Elwood Dennett it had been completed to include specific reference to the taxable year 1961?

Answer: Yes

2. Do you find by a preponderance of the evidence that at the time of the signing of said waiver John Elwood Dennett understood and intended that it would relate to the taxable year 1961?

Answer: Yes

3. Do you find from a preponderance of the evidence that defendant John Elwood Dennett's net taxable income upon which his income tax should have been computed for 1961 was:

$3055.78 (as reported by defendant John Elwood Dennett)?

Answer: No

$111,055.81 (as contended by the government)?

Answer: Yes

Another amount? (if so, state) $_____

4. Do you find by a preponderance of the evidence that at the time of the tax levy John Elwood Dennett was the actual owner of the funds totaling $7052 in question?

Answer: Yes

5. Do you find by a preponderance of the evidence that at the time of said levy C. Dwayne Harrison was the actual owner of said funds?

Answer: No

(If your answers to questions 4 and 5 are both no, then answer question 6.)

6. Do you find by clear and convincing evidence that any such funds were held in trust by either John Elwood Dennett or C. Dwayne Harrison for someone else at the time of said levy?

Answer: No

(If your answer to question 6 is yes, then answer question 7.)

7. State by whom, for whom and in what amount, if any, such funds were held in trust.

Dated this 26th day of September, 1970.

FOR THE JURY

/s/ VERSEL J. MASON
Foreman

After considering the verdict returned by the advisory jury and deeming the answers to said special interrogatories to be consistent with the facts shown by a preponderance of the evidence presented by the parties in this matter, the Court now makes the following

FINDINGS OF FACT

1. The Court hereby adopts the answers of the jury to the special interrogatories as part of its own findings of fact.

2. On September 14, 1967, the defendant John Elwood Dennett filed an original petition for relief under the provisions of Chapter XII of the Bankruptcy Act in the above-entitled Court.

3. On December 4, 1967, the defendant John Elwood Dennett was involuntarily adjudged a bankrupt under the said Act.

4. On May 17, 1968, an assessment was made against John Elwood Dennett by the Internal Revenue Service in the sum of $112,235.67, which represents an income tax deficiency for 1961, together with penalties and interest to the date of the assessment.

5. Timely notice of said assessment for 1961 was given to defendant John Elwood Dennett in accordance with the provisions of the Internal Revenue Code, and demand for payment thereof was made as provided by law.

6. On or about October 23, 1968, the plaintiff, Continental Bank & Trust Co. issued its Cashier's Checks Nos. 74547 in the sum of $3,860.00 and 74548 in the sum of $3,192.00, to the order of the Beneficial Life Insurance Company. Tender of said checks was made by defendant John Elwood Dennett to the Beneficial Life Insurance Company, but such tender was refused and the checks were returned to said defendant.

7. On October 31, 1968, the plaintiff Continental Bank & Trust Company was served with a notice of levy by the Internal Revenue Service, particularly directed at the funds covered by the aforementioned Cashier's Checks. This levy was made to enforce a tax lien filed with the Salt Lake County Recorder on July 23, 1968 against defendant John Elwood Dennett relative to the deficiency in his 1961 income taxes.

8. The defendant John Elwood Dennett was in truth and in fact the owner of the funds represented by the two Cashier's Checks, payable to the Beneficial Life Insurance Company, designated as Exhibits USA No. 3 and USA No. 4, when the Internal Revenue Service filed its levy on the funds in question. The interest in the funds on deposit with the Clerk was acquired by said defendant after September 14, 1967.

9. In filing his income tax return for 1961, the defendant John Elwood Dennett omitted from his gross income an amount properly includable therein, that is over 25% of the amount of gross income actually stated in the tax return.

10. The income tax return of John Elwood Dennett for 1961 was delinquent when filed. There has been no showing by said defendant that due care was

exercised in the preparation of the tax return or in the keeping of adequate records as required by Section 6001 of the Internal Revenue Code.

From the foregoing Findings of Fact, the Court now makes its

CONCLUSIONS OF LAW

1. The Net Worth and Expenditures Method of Proof was properly used by Internal Revenue agents to determine the taxable income of defendant John Elwood Dennett for 1961.

2. The Statute of Limitations does not bar the action of the defendant United States of America against the defendant John Elwood Dennett for unpaid taxes for 1961.

3. No trust relationship existed between the defendant John Elwood Dennett and any other person pertaining to the ownership of the funds on deposit with the Clerk of the Court.

4. No trust relationship existed between the defendant Clyde Dwayne Harrison and any other person pertaining to the ownership of the funds on deposit with the Clerk of the Court.

5. The Court does not have jurisdiction to enjoin the collection of Internal Revenue Service taxes, and the cross-claim of defendant John Elwood Dennett should be dismissed.

6. The defendant Clyde Dwayne Harrison is not entitled to any part of the funds on deposit with the Clerk of the Court.

7. The defendant Herschel J. Saperstein, as Trustee in Bankruptcy of the estate of defendant John Elwood Dennett, is not entitled to any part of the funds on deposit with the Clerk of the Court.

8. The Federal Tax Lien for taxes due and owing by defendant John Elwood Dennett for 1961 attaches to the funds on deposit with the Court. The defendant United States of America, by reason of its Internal Revenue Service levy served upon the plaintiff Continental Bank & Trust Company, is entitled to a judgment of this Court awarding the funds on deposit with the Clerk of the Court to the government.

9. The judgment of the State Court in litigation involving the Beneficial Life Insurance Company and defendant John Elwood Dennett has no effect on this litigation.

10. The six-year Statute of Limitations for the assessment of the tax provided in Section 6501(e)(1)(A), of the Internal Revenue Code of 1954 is applicable to the claims of defendant John Elwood Dennett in this case.

11. The statutory period for the assessment of the 1961 income tax deficiency was properly extended by agreement in writing between a delegate of the Secretary of the Treasury and defendant John Elwood Dennett in accordance with Section 6501(c)(4) of the Internal Revenue Code of 1954.

12. Defendant John Elwood Dennett was subject to a negligence penalty provided by Section 6653(a) of the Internal Revenue Code in connection with the understatement of his income in his 1961 tax return.

13. Defendant John Elwood Dennett was subject to a delinquency penalty provided by Section 6651 of the Internal Revenue Code in connection with the understatement of his income in his 1961 tax return.

14. The defendant United States of America is further entitled to a judgment against the defendant John Elwood Dennett for unpaid taxes for 1961 in

the sum of $117,043.76 for delinquent income taxes, together with penalties and interest payable to and including September 21, 1970.

15. This sum is based on the following calculations:

Tax Assessment	$ 76,536.80
Interest to Date of Assessment	27,960.91
Interest Accrued Since Date of Assessment	11,861.51
Delinquency Penalty	3,869.23
Negligence Penalty	3,869.23
Total Tax Liability	$124,097.18
Less Payment	1.42
Less Amount of IRS Levy	7,052.00
Remainder Due and Owing for 1961 Taxes	$117,043.76

In addition thereto, the defendant United States of America is entitled to interest in the sum of $13.4837 per day to the date of judgment, or a total sum of $_____.

JUDGMENT

In accordance with the above Findings of Fact and Conclusions of Law, and based thereon,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The claims of defendants John Elwood Dennett, Clyde Dwayne Harrison and Herschel J. Saperstein, Trustee in Bankruptcy, in and to the funds on deposit with the Clerk of the Court in the sum of $7052.00 are dismissed with prejudice.

2. The defendant United States of America is lawfully entitled to the sum of $7,052.00 that was paid into the registry of this Court by the plaintiff. The Clerk of the Court is hereby ordered to pay said sum

to the Internal Revenue Service on demand, and the United States Attorney for the District of Utah shall acknowledge receipt thereof in the files and records of the Court.

3. The defendant United States of America is awarded judgment against the defendant John Elwood Dennett on its cross-claim in the sum of $117,043.76 for delinquent income taxes, together with penalties and interest computed thereon to September 21, 1970. In addition thereto, the defendant United States of America is entitled to interest in the sum of $13.4837 per day to the date of judgment, for the further sum of $_____. Interest on said amounts shall be payable at the rate of eight per cent (8%) per annum until the balance is paid in full.

4. The defendant United States of America is hereby awarded judgment against defendants John Elwood Dennett and Clyde Dwayne Harrison for its costs of court.

DATED this _____ day of October, 1970.

BY THE COURT:

_____

A. SHERMAN CHRISTENSEN
Judge
United States District Court

Submitted By:

H. Ralph Klemm
Assistant United States Attorney
Attorney for United States of America

JANUARY TERM, JANUARY 26, 1972

Before Honorable Delmas C. Hill, and Honorable Robert H. McWilliams, Circuit Judges

No. 71-1466

THE CONTINENTAL BANK AND TRUST COMPANY, PLAINTIFF-APPELLEE

vs.

JOHN ELWOOD DENNETT, DEFENDANT-APPELLANT, UNITED STATES OF AMERICA, DEFENDANT-APPELLEE,

C. DWAYNE HARRISON, BENEFICIAL LIFE INSURANCE COMPANY, a corporation, and HERSCHEL J. SAPERSTEIN, Trustee in Bankruptcy No. B-1153-67, DEFENDANTS

On November 29, 1971, appellant was granted an extension of time to December 20, 1971, within which to file his opening brief with the further order that no further extension of time in this regard would be granted. On December 21, 1971, appellant attempted to file with this Court an opening brief which was received but not filed by the Clerk of this Court for the reason that the brief was tendered one day late and for the further reason that the brief as tendered did not contain a cover page, an index or a certificate of service. Appellant was told by the Chief Deputy that he must promptly file a motion for leave to file his brief out of time, and must provide a cover page, an index and a certificate of service as required by the rules.

Thereafter on January 17, 1972, appellant tendered to the Court a new set of briefs which did contain a cover page, an index and a certificate of service to-

gether with a motion that he then be permitted to file his opening brief. Under such circumstances the appellant's Motion for Leave to File Opening Brief on December 21, 1971 [the brief with a cover page, an index and a certificate of service was not tendered on December 21, 1972, but was tendered on January 17, 1972], is hereby DENIED and the appeal is hereby ORDERED DISMISSED for failure of the appellant to timely prosecute.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

APPENDIX B

The Federal Rules of Appellate Procedure provide in pertinent part as follows:

Rule 12. DOCKETING THE APPEAL; FILING OF THE RECORD

* * * * *

(c) *Dismissal for Failure of Appellant to Cause Timely Transmission or to Docket Appeal.* If the appellant shall fail to cause timely transmission of the record or to pay the docket fee if a docket fee is required, any appellee may file a motion in the court of appeals to dismiss the appeal. * * *

* * * * *

Rule 25. FILING AND SERVICE

(a) *Filing.* Papers required or permitted to be filed in a court of appeals shall be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that briefs and appendices shall be deemed filed on the day of mailing if the most expeditious form of delivery by mail, excepting special delivery, is utilized. * * *

* * * * *

Rule 28. BRIEFS

(a) *Brief of the Appellant.* The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(1) A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.

* * * * *

Rule 31. FILING AND SERVICE OF BRIEFS

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(c) *Consequence of Failure to File Briefs.* If an appellant fails to file his brief within the time provided by this rule, or within the time as extended, an appellee may move for dismissal of the appeal. * * *

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